LIBRARY
SUPREME COURT, U. S.

FILED
AUG 26 1974
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-184

MICHAEL S. ROSS, Petitioner

v.

UNITED STATES OF AMERICA, et. al.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Michael S. Ross
5502 Pelham Road
Durham, North Carolina 27707

INDEX

	Page
Opinions Below	2
Jurisdiction	6
Questions Presented	7
Constitutional, Statutory And Regulatory Provisions Involved .	10
Statement of the Case	15
Reasons for Granting the Writ . . .	25
Conclusion	46
Appendix A (Opinion of the District Court For the Central District Of California)	47
Appendix B (Opinion of the United States Court Of Claims)	50
Appendix C (Denial of rehearing by United States Court Of Claims) .	51
Appendix D (Notice of Appeal) . . .	52
Appendix E (28 U. S. C., Section 1346)	53

CASE CITATIONS

Case	Page
Ashe v. McNamara, 355 F. 2d. 277, (1st Cir. 1965)	31
Burns v. Wilson, 346 U. S. 137, 73 S. Ct. 1046, 97 L. Ed. 2d. 1508, (1953)	30
Carney v. U. S., 462 F. 2d. 1142, 199 Ct. Cl. 160, (1972) . . .	25, 40
Carter v. Seamans, 411 F. 2d. 767, cert. denied 397 U. S. 941, 70 S. Ct. 953, 25 L. Ed. 2d. 121, (1969)	26, 39, 40
Clinton v. U. S., 423 F. 2d. 1367, 191 Ct. Cl. 605, (1970)	26
Edgar v. U. S., 171 F. Supp. 243, 145 Ct. Cl. 9, (1959)	26
Fleming v. Chafee, 330 F. Supp. 193, (1971 D. C. N. Y.)	25
Glidden Co. v. Zdanck, 370 U. S. 530	28
Green v. U. S., 172 F. Supp. 679, 145 Ct. Cl. 628, (1959)	26
Harmon v. Brucker, 355 U. S. 519, 78 S. Ct. 433, 2 L. Ed. 2d. 503, (1958)	25, 30
Homcy v. Resor, 147 U. S. App. D. C., 277, 455 F. 2d. 1345, (1971) .	25, 31

CASE CITATIONS (cont.)

Case	Page
International Engineering Co. v. Richardson, 361 F. Supp. 818, (1973)	26
Johnson v. Zerbst, 304 U. S. 458, 58 Ct. Cl. 1019, 82 L. Ed. 1461, (1938) .	30
Kauffman v. Secretary of the Air Force, 135 U. S. App. D. C. 277, 415 F. 2d. 991, (1969)	30
Kirby v. U. S., 201 Ct. Cl. 537, (1973)	26
Larsen v. U. S., 170 F. Supp. 806, 145 Ct. Cl. 178, (1959)	26
Minnesota v. Weinberger, 359 F. Supp. 789, (1973).	26
Melvin v. Laird, 365 F. Supp. 511, (1973)	29
Parrish v. Seamans, 343 F. Supp. 1093, (1972) 26, 39, 40	
Paulsen v. U. S., p. 570, Order No. 327-67, Ct. Cl., (1969)	26
Technology Printed Circuits, Ltd. v. U. S., 372 F. 2d. 969, 178 Ct. Cl. 543, (1967)	26
U. S. v. Alire, 6 Wall 573	28
U. S. v. Jones, 131 U. S. 1	28

CASE CITATIONS (cont.)

Case	Page
U. S. v. King, 395 U. S. 1, (1968)	25, 28, 29, 35, 36
Ward v. U. S., 428 F. 2d. 1288, (1970)	26
William v. U. S., 139 F. Supp. 951, 134 Ct. Cl. 763, (1956)	26
Zimmerman v. U. S. Government, 422 F. 2d. 326, (1970)	26

CONSTITUTION

Section	Page
Article IV	9, 10
Amendment V	10

STATUTES

Section	Page
U. S. C., Title 10, Section 815	22
U. S. C., Title 10, Section 818	27
U. S. C., Title 10, Section 819	27
U. S. C., Title 10, Section 820	27

STATUTES (cont.)

Section	Page
U. S. C., Title 10, Section 933	27
U. S. C., Title 28, Section 1346	11, 31, 34
U. S. C., Title 28, Section 1361	6, 11, 31
U. S. C., Title 28, Section 1491	11, 31, 34
U. S. C., Title 28, Section 1651	6
U. S. C., Title 28, Section 2201	6
U. S. C., Title 28, Section 2401	4, 9
U. S. C., Title 28, Section 2501	4, 6, 9

REGULATIONS

Section	Page
C. F. R., Title 32, Section 101.3	21
C. F. R., Title 32, Section 713.326 (2)	16, 22
C. F. R., Title 32, Section 713.381 (a) (3) and (b)	19, 20
C. F. R., Title 32, Section 713.382 (a) (2)	19
C. F. R., Title 32, Section 713.403 (3)	22

REGULATIONS (cont.)

Section	Page
C. F. R., Title 32, Section 713.412 (b)	22
C. F. R., Title 32, Section 730.12	19, 22
C. F. R., Title 32, Section 730.15	22

MICHAEL S. ROSS
5204 Pelham Road
Durham, North Carolina 27707
TEL: (919) 544-3001

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL S. ROSS, Plaintiff, vs. THE UNITED STATES OF AMERICA, and JOHN HUBBARD CHAFEE, Secretary of the Navy, and DR. ROBERT C. SEAMONS, JR., Secretary of the Air Force, Defendants.	CIVIL NO. 74-527LTL COURT OF CLAIMS NO. 352-73 PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays for a writ of certiorari to the United States Court Of Claims to review an order of that Court entered on May 31, 1974 concluding petitioner's cause for declaratory judgment and monetary damages to be barred therein by the statute of limitations encompassed by U. S. C., Title 28, Section 2501.

SUMMARY OF LOWER COURT OPINIONS

A decree, included as addendum hereto as Appendix A at pages 47-49, sustaining jurisdiction therein but delaying examination on the merits until exhaustion of administrative remedies in the military correction boards was entered in the United States District Court For the Central District Of California, the Honorable Robert J. Kelleher presiding, on June 12, 1972. No appeal was taken from said judgment by either party.

Extremely disdraught monetarily over a so-called "criminal conviction" in early 1971 for alleged attempted extortion in attempting to

bring forth the truth to evidence to attorneys the grounds for and necessity of judicial relief, extended litigation against the Veterans Administration culminating in instigation of the within cause and procrastination of the Board For the Correction Of Naval Records in delaying over a year in ruling on plaintiff's prerequisite application thereto, immediately upon receipt of the Board's review decision in early September, 1973, petitioner, eager to cash in and end the monetary draught and feeling the rendering of a declaratory judgment automatic and merely a procedural formality at this stage and that the worst rationale that could prevail would be that his filing therein was premature, instituted an identically styled suit to the aforementioned in the United States Court Of Claims on September 25, 1973. Extention was granted to the defendant United States until the 25th of January, 1974 for the reason that the Department Of the Navy had delayed in transmitting petitioner's military record together with the facts and circumstances

attendant thereto to the Department Of Justice and thereby prevented counsel for the defendant from being able to prepare an informative response. On March 15, 1974 presiding judge Skelton together with judges Kashiwa and Kunzig deemed, as reported herein at Appendix B at page 50, petitioner's claim barred by the running of the statute of limitations therein under U. S. C., Title 28, Section 2501 as exclusive, separate and distinct from the statute of limitations applicable to district court causes, U. S. C., Title 28, Section 2401.

Coincident therewith on March 8, 1974 plaintiff dutifly repeated his earlier complaint filing in the United States District Court For the Central District Of California.

Upon notification of said petition denial in the Court Of Claims petitioner duly prepared and proffered his petition for rehearing therein. Likewise, shortly thereafter on June 5, 1974 he received the document addended hereto at Appendix C at page 51, denying said rehearing petition effective May 31, 1974.

Whereupon, petitioner immediately docketed the notice of appeal appearing as Appendix D page 51 herein.

Now in a series of one motion to dismiss coupled with three memoranda supplemental thereto the defendant seeks to foreclose petitioner's cause in the United States District Court For the Central District Of California as well solely on the basis of the res judicata? of the Court Of Claims later and separate incredulous finding of bar by the statute of limitations. And, in fact, has succeeded, over petitioner's objections, in obtaining a stay therein pending the outcome of this appeal.

JURISDICTION TO REVIEW

The instant action was brought immediately upon discovery of the existence thereof of means by which to correct petitioner's United States Navy record to witness the three years of honorable commissioned service reflective

of the true legal consequence of the events occurring therein under authority of the Declaratory Judgment Act, U. S. C., Title 28, Section 2201 and for recovery of back pay thereupon pursuant to the Mandamus Statute, U. S. C., Title 28, Section 1361.

The judgements sought to be corrected to conform to the prior unappealed ascertainment of the United States District Court For the Central District Of California are the conclusions of the Court Of Claims on March 15, 1974 that petitioner's cause was barred by the statute of limitations peculiar to that Court, U. S. C., Title 28, Section 2501 and its denial of petition for rehearing entered on May 31, 1974. Notice of appeal was filed on June 12, 1974 in the United States Court Of Claims. This petition for certiorari was filed less than ninety days from the date aforesaid.

Authority to resolve this potentially perpetual controversy is conferred upon this Court by U. S. C., Title 28, Section 1651 (a).

QUESTIONS PRESENTED

Before the Court Of Claims was granted cognizance of declaratory judgment actions in August, 1972, just prior to the running of the statute of limitations of the instant cause in the district courts, on February 25, 1972 petitioner filed the within equitable and monetary complaint in the United States District Court For the Central District Of California. Jurisdiction was upheld therein while consideration of the merits was postponed pending prerequisite administrative review. Subsequent to the formality of rendition of that review on September 16, 1973, petitioner submitted an identically styled claim to the United States Court Of Claims. Said claim was construed thereby on March 15, 1974 to be barred by the statute of limitations applicable exclusively to it and to no other. Now, the defendant options to use that judgment by virtue of application of the res judicata?oof the later

Court Of Claims decision on the earlier contrary determination of the United States District Court For the Central District Of California to close the only route which this Court and the Congress provided for relief. The crux of this dispute, then, stems essentially from the failure of the Court Of Claims to be bound by the precursing a priori unappealed decisions of the United States District Court For the Central District Of California in following the sequence of action prosecutions specifically prescribed by this Court as mandatory to obtain the type of relief sought. The questions thereby arising are:

1. The within action focuses upon and asks the plenary judicial resolution of a single critical central issue. That issue is, simply whether the filing and acceptance of jurisdiction over an identical action in the District Court For the Central District Of California on February 25, 1972 stays the running of the statute of limitations on the

very same action filed on September 25, 1973 in the United States Court Of Claims for specialized declaratory judgment actions for amounts in excess of $10,000.00 requiring later adjudication of monetary recovery by the Court Of Claims.

a. Ancillary thereto is the question of whether U. S. C., Title 28, Section 2501 constitutes suchaa separate and independent statute of limitations from U. S. C., Title 28, Section 2401 for the United States Court Of Claims so as to render timely applications under the latter, at least in the type of communitive case here involved, untimely when filed after the six year limit in the Court Of Claims.

b. Inclusive therein as well is the possibility of a violation of the full faith and credit clause of Article IV, Section I of the Constitution of the United States of America.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Constitution Of the United States:

Article IV. The States and the Federal Government

Section 1. Official Acts Of the State

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Amendment V. Criminal Proceedings and Condemnation Of Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public

danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nornor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Statutes Of the United States:

U. S. C., Title 28, Section 1346 (addended hereto as appendix E, page 53), page 251.

U. S. C., Title 28, Section 1361, page 20.

Action To Compel an Officer Of the United States To Perform His Duty

The district courts shall have original jurisdiction of any action in the nature of a mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

U. S. C., Title 28, Section 1491, page 513.

Claims Against the United States Generally

The Court Of Claims shall have jurisdiction to render judgment upon any claim against the United States:

(1) Founded upon the Constitution; or

(2) Founded upon any Act of Congress; or

(3) Founded upon any regulation of an executive department; or

(4) Founded upon any express or implied contract with the United States; or

(5) For liquidated or unliquidated damages not sounding in tort.

U. S. C., Title 28, Section 2201, page 412.

The Declaratory Judgment Act. Creation Of a Remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is

or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

U. S. C., Title 28, Section 2401, page 293.

Statute Of Limitations

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $2,500.00, it is presented in writing to the appropriate Federal agency

within two years after the date of enactment of this amendatory sentence, whichever is later. If a claim not exceeding $2,500.00 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim.

U. S. C., Title 28, Section 2501, page 2.

Statute of limitations

(a) Every claim of which the Court Of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvement operations

on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office fails to act within six months after reviewing the account.

STATEMENT OF THE CASE

On May 10, 1961 petitioner volunteered and contracted for six years of enlisted service in the United States Naval Reserve to be performed in two parts: a two year active duty segment and four years of reserve endeavor and training. After completing accelerated boot camp, in August, 1961, on April 3, 1962 petitioner embarked on

the most desireable BuPers scheduled 21 month trainigg curriculum in electronics technicianry (comprising 6 months basic electricity training coupled with 15 months training in basic electronics) at NRSD 11-3, Los Alamitos. Upon his entry the class had more than hàlf completed the intial six month basic electricity course; consequently, he performed double duty without complaint to stay abreast.

Later, he became somewhat disenchanted with the seeming low morality prevalent amongst the enlisted ranks; thus, when the opportunity to gain a commission through the Naval Reserve Officer Candidate program arose in December, 1962, petitioner jumped at the chance, C. F. R., Title 32, Section 713.326 (2). The original enlistment contract was superseded by a three year active commissioned service obligation and open end commissioned reserve obligation. The first rugged summer session was completed in satisfactory fashion in August, 1963.

Owing to his excellent demonstration

of potentional in chemistry at Long Beach State College, in order to complete his educational training at the University of California, Berkeley in chemical engineering, petitioner was directed at Los Alamitos, NRSD 11-3, to attend drills at NRSD 12-6, Vallejo, California.

Thus, on September 4, 1963, petitioner and his parents sojourned to the situs of NRSD 12-6, whereupon they were advised of the prohibitive distance involved for access to this location via public transportation and assigned thereby pursuant to Com Twelve Inst. 1306.5C to transfer to NRSD 12-26, Treasure Island, California. Later that same afternoon petitioner inquiried, in the presence of his father, of the yeoman stationkeeper on duty at NRSD 12-26 of the meeting time designated for said unit. This was stated by him to be on the first weekend of each month. It was then reiteratively queried of this third or second class yeoman whether petitioner should report at the upcoming

October meeting. The repeated reply was an emphatic negative for the reason that the unit would not yet have received petitioner's records from NRSD 11-3. When asked when he should report, petitioner was order by this individual in the presence of his father to await contact by NRSD 12-26.

Finally, curious and worried about what NRSD 12-26 expected of him and eager to continue his ascent to electronics technician third class, on or about December, 1963, petitioner telephoned the representative of that unit and learned that they expected his presence at the subsequent drills. At the January, 1964 drill, petitioner explained what had transpired to Commander Holst and was severely reprimanded.

At that point petitioner ostensibly resumes his quest for electronic technician third class petty officer status, but his efforts are stymied at every turn by the first class instructor thereat who refuses to instruct electronics, to provide advancement examinations,

or do anything but consume the whole eight hour training period in the narration of dity jokes in diametric contravention of his responsibilities under C. F. R., Title 32, Section 713.382 (a) (2).

Petitioner sits calmly by apprehensive about his rapidly diminishing electronic technician prowess, repulsively soaking up this mealy-mouth sickening garbage, meanwhile, politely, cogently, pleadingly urging the "instructor" to reform of his own volition and constantly clamoring to the officerdom of NRSD 12-26 to act either to compel the first class to do his job, allow petitioner to study on his own, transfer petitioner, or remove the "instructor." All such requests and demands were rebuffed on the grounds that "nothing could be done." Inasmuch as this prolonged shirking violated C. F. R., Title 32, Section 713.381 (a) (2) & (b) and Section 730.12 (b) (2), it was unlawful, constituting an intent to defraud petitioner, his classmates and the United States out of their electronic technicianships and the benefits expected to be derived from its salary payments,

expected to be derived from its salary payments, respectively, and the moneys to be paid them and him by the United States, respectively, and should have been stopped by command authorities, C. F. R., Title 32, Section 713.381.

Finally, petitioner became so rankled, angry, tormented, frustrated and driven crazy in the course of being illegally forced to listen to this uncouth, demeaning, sickening slop over the course of two years while his electronic technician thirdship slipped away that at the March, 1965 drill, petitioner searched for and found a place of recluse and aolitude within the confines of Hanger No. 2 to engage in serious prolific study of chemical engineering curriculum including electrical engineering 101, comprising a study of electronics and solid state electronics. The "instructor" discovered petitioner's absence and apparently tattletailed his version of petitioner's conduct to unit commander, Jerry J. Holst, CDR.

Hence, immediately upon commencing

the next drill, April, 1965, petitioner was called out on the carpet by the commanding officer. Whereupon, without specifying any statutory or regulatory violation, Commander Holst announced that he would recommend petitioner's discharge from the R. O. C. program for "unofficer-like conduct," over petitioner's vehement protests that the electronics technician instructor has done nothing but tell dirty jokes for years and for a hearing or courts-martial trial.

Although satisfactory compliance with Naval Reserve obligation under Navy regulations, C. F. R., Title 32, Section 101.3, allows for 10% unexcused absences, unlimited certified excused absences for sickness and no where requires attendance at dirty joke sessions, prescribes dirty jokes sessions as proper tate training subject matter, or requires attendance at activities unauthorized by law and petitioner's attendance record is essentially impeccable, Commander Holst's recommendation effectuated

petitioner's removal from the R. O. C. program, C. F. R., Title 32, Section 713.326 without authority, U. S. C., Title 10, Section 815, and without benefit of hearing or trial plainly made prerequisite to removal by C. F. R., Title 32, Section 713.403 (3), Section 713.412 (b), Section730.12 and Section 730.15 and U. S. C., Title 10, Sections 818, 819, 820 and 933. Consequently, such action was and is wholly arbitrary and capricious, totally absent the due process of law a legal nullity and void.

Petitioner thus reasoned that he had effectively been convicted of criminal conduct, severely defamed thereby and defrauded and robbed of $20,000.00 without benefit of a trial and believing it unconscionable and catastrophic employment-wise and economically to withstand the scrouge of such a criminal conviction upon his release from service, he inquired into the possibility of covering up this scar on his record by entering the Air Force Officer Training program. Unbeknownst to petitioner, Commander

Holst received immediate notification of this inquiry and undertook to inflict, without reason, the still further punishment upon petitioner of assigning him to fleet reserve ship U. S. S. WALTON (DE 161) including an extra drill on Friday evening each month and eliminating all specialty rate training whatsoever.

As a proximate cause of Commander Jerry J. Holst's criminal act discharging petitioner from the R. O. C. program late in the 1965 school year petitioner lost, in the alternative his compensation for summer employment as a chemical engineer of approximately $2,000.00 or his earnings for completion of the 1965 R. O. C. commissioning summer.

Finally, at a special session held in San Francisco on February 20, 1966, Mary L. Brown, CDR, acting for the commandant of the Twelfth Naval District denied petitioner's advocation of his entitlement to serve either

as a Naval Reserve Officer of electronics technician third class or better or be released, while simultaneously recommending petitioner for re-enlistment in the Air Force wherein she knew petitioner would engage in their officer training program.

Moreover, as evidenced from the affidavit of petitioner's former electronics technician instructor at NRSD 11-3, Mr. William B. Corbett, the NRSD 12-26's first class's action was intended to defraud petitioner out of the compensation commensurate with the status of electronic technician third and second class petty officer.

On February 25, 1972 petitioner commenced suit in the Federal District Court For the Central District Of California for correction of his Naval Reserve records to reflect three years of honorable commissioned service, for back pay therefor and reinstatement in commissioned status in the Naval Reserve. That complaint was deemed premature for the reason of petitioner's failure

to exhaust his administrative remedies in the respective military correction boards and judgment entered in the defendants favor without prejudice to petitioner's refiling said complaint upon satisfaction of that objection.

On August 2, 1972 and August 31, 1973, the Air Force and Navy Board For the Correction Of Military Records, respectively, denied petitioner's applications for corrective actions thereto.

The very entity of the Court Of Claims itself has repeatedly, unequivocally, without exceptiong, unwaiveringly, resolutely decreed that accepted filings in the district court are equivalent to filings in the Court Of Claims and as such, upon assumption of jurisdiction, stay the statute of limitations therein; U. S. v. King, 395 U. S. 1, (1968); Harmon v. Brucker, 355 U. S. 519, 78 S. Ct. 433, 2 L. Ed. 2d. 503, (1958); Carney v. U. S., 462 F. 2d. 1142, 199 Ct. Cl. 160, (1972); Homcy v. Resor, 147 U. S. App. D. C. 277, 455 F. 2d. 1345, (1971);

Ward v. U. S., 428 F. 2d. 1288, (1970); Clinton v. U. S., 423 F. 2d. 1367, 191 Ct. Cl. 605, (1970); Zimmerman v. U. S. Government, 422 F. 2d. 326, 327, (1970); Carter v. Seamans, 411 F. 2d. 767, 774, cert. denied 397 U. S. 941, 70 S. Ct. 953, 25 L. Ed. 2d. 121, (1969); Technology Printed Circuits Ltd. v. U. S., 372 F. 2d. 969, 974-975, 178 Ct. Cl. 543, 550-551, (1967); Kirby v. U. S., 201 Ctl Cl. 537, (1973); Internation Engineering Co. v. Richardson, 361 F. S. 818, (1973); Minnesota V. Weinberger, 359 F. S. 789, (1973); Parrish v. Seamans, 343 F. S. 1093, 1094; Fleming v. Chafee, 330 F. S. 193, (1971 D. C. N. Y.); Green v. U. S., 172 F. S. 679, 145 Ct. Cl. 628, (1959); Paulsen v. U. S., p. 570, Order No. 327-67, Ct. Cl., (1969); Edgar v. U. S., 171 F. S. 243, 145 Ct. Cl. 9, (1959); Larsen v. U. S., 170 F. S. 806, 145 Ct. Cl. 178, (1959) and William v. U. S., 139 F. S. 951, 134 Ct. Cl. 763, (1956).

Yet in the instant case, with the apparent intent of avoiding decision of this

harsh case for government military employees, if the United States and, in particular, its criminal officer representatives lose as defense counsel knows they must with the true facts applied to the law presently in force, that Court has contradicted itself without specifically reversing its rulings in even a single one of these prior determinations. Is petitioner to be defeated solely on the grounds that the statute of limitations has been allowed to continue to run while thousands of attorneys persisted in denying to petitioner the existence of any cause of action when he had relied specifically on the credibilty of decisions promulgated in that Court and followed the directions of the District Court in waiting nearly two years for the correction boards to act on a case which could only have, should have and must have been decided instantaneously in a courts-martial action, U. S. C., Title 10, Section 818, in 1965, in deciding very reasonably on a moments notice, that duplicate filing is

slurplusage, unnecessary, a waste of judicial machinery and probably premature in the Court Of Claims because no enforceable judgment or outstanding immediately collectable debt exists. In fact, this is precisely the conclusion reached by this Court in U. S. V. King, supra, at page 3;

> "In 1868 this Court held that 'the only judgments which the Court Of Claims is authorized to render against the government ..... are judgments for money found due from the government to the petitioner, U. S. v. Alire, 6 Wall 513, 515. In U. S. v. Jones, 131 U. S. 1, this Court reaffirmed this view of the limited jurisdiction of the Court Of Claims and held that passage of the Tucker Act in 1887 had not expanded that jurisdiction to equitable matters. More recently, in 1962, it was said in the prevailing opinion in Glidden Co. v. Zdank, 370 U. S. 530, 557, on a point not disputed by any of the other members of this Court that 'from the beginning [the Court Of Claims] has been given jurisdiction only to award damages. The foregoing cases decided by this Court, therefore, clearly show that neither the Act creating the Court Of Claims nor any amendment to it granted that court jurisdiction of this present case. That is true because Colonel King's claim is not limited to actual presently due money damages from the United States. Before he is entitled to such a judgment he must establish in some

> court that his retirement by the Secretary Of the Army for longevity was legally wrong and that he is entitled to a declaration of his right to have his military records changed to show that he was retired for disability."

In order to achieve the relief sought, petitioner need only demonstrate lack of infirmity and extinction of contractual obligation to the Navy upon Commander Jerry J. Holst's ignomious action in severing petitioner's commissioned status, this petitioner had accomplished irrefuteably and uncontrovertably in the district court by the Board For the Correction Of Naval Records comminique, petitioner's true Naval Reserve record, Chief Warrant Officer William B. Corbett's affidavit, attainment of Second Lieutenant's commission in the United States Air Force and Title 10, U. S. C., Section 818, general courts-martial jurisdiction. In so doing petitioner followed the procedural scheme of proof ludicly laid out by this Court in U. S. v. King, supra and probably most explicitly outlined in Melvin v. Laird, 365 F. Supp. 511,

"Since Johnson v. Zerbst, 304 U. S. 458, 58 Ct. Cl. 1019, 82 L. Ed. 1461, (1938), the federal courts have exercised habeas corpus jurisdiction over federal court convictions involving violation of constitutional rights not constituting a jurisdictional defect--there denial of counsel was alleged. In Burns v. Wilson, 346 U. S. 137, 73 S. Ct. 1045, 97 L. Ed. 1508, (1953), a like jurisdiction was extended to convictions by courts-martial. Mandamus was held to be an appropriate remedy in the case of a former serviceman, not in custody, who challenged a less than honorable discharge, in Harmon v. Brucker, 355 U. S. 579, 78 S. Ct. 433, 2 L. Ed. 503, (1958).

Jurisdiction of federal courts to review courts-martial for constitutional defects is generally coextensive with their habeas corpus jurisdiction in civilian cases. The scope of federal court review of court-martial is not limited, as some originally though to the technical elements of jurisdiction or to a mere inquiry into whether the plaintiff received a "full and fair" hearing from the military court, but extends to all errors of constitutional dimension. See, e. g., Kauffman v. Secretary of the Air Force, 135 U. S. App. D. C. 277, 415 F. 2d. 991, (1969), cert. denied, 396 U. S. 1013, 90 S. Ct. 572, 24 L. Ed. 2d. 505, rehearing denied, 397 U. S. 1031, 90 S. Ct. 1255, 25 L. Ed. 2d. 546, (1970).

There are a number of routes that may be followed in obtaining collateral review of court-martial convictions in civilian courts. For a serviceman no longer in custody, the primary alternatives are (1) an action in a federal district court for mandamus or declaratory judgment, and (2) a suit in the Court of Claims for back pay. Where a district court has found the plaintiff's claim meritorious, the result has typically been a holding that the court-martial sentence was a nullity and that necessary action should be taken to remove the disabilities that flow from the sentence. Sometimes this takes the form of a mandatory injunction directed to the Secretary. See, e. g. Ashe v. McNamara, 355 F. 2d. 277, (1st Cir. 1965). At other times a declaratory judgment and remand to the Department for appropriate action is utilized. See, e. g., Homcy v. Resor, 147 U. S. App. D. C. 277, 455 F. 2d. 1345, (1971).

Notwithstanding these authorities, defendants urge that, because a judgment favorable to plaingiff here may give rise to sbustantial monetary liability--well in excess of $10,000.00--against the United States for back pay, this court is ousted of subject matter jurisdiction. The superficial appeal of this position arises from the fact that while the Court of Claims can grant both monetary and other relief, the district courts do not have jurisdiction to render money judgments in excess of $10,000.00. 28 U. S. C., Sections 1346 (b), 1491, cf-- 28 U. S. C., Section 1361. This position does not withstand analysis.

Development of the powers of the district courts and the Court Of Claims to provide particular kinds of relief has been characterized by a gradually expanding area of concurrent jurisdiction. Prior to the 1964 passage of the Tucker Act, 28 U. S. C., Section 1346, there appears to have been no overlap at all. Subsequently the power, first of the district courts to award money judgments and then of the Court Of Claims to issue non-monetary orders, has been expanded, so that today both courts have the power to issue both monetary and non-monetary judgments, where appropriate. The history and statutory language of these developments discloses not the slightest indication that Congress intended, in expanding the powers of one of these tribunals, to reduce those of the other; the evidence is strongly to the contrary.

Before 1964, the respective jurisdiction of the district courts and the Court Of Claims were entirely separate in terms of the relief they could grant, so that it was necessary for a litigant who sought both declaratory judgment and back pay to go to both courts. The Tucker Act partly rectified this situation, granting power to the district courts to render money judgments against the United States for amounts not exceeding $10,000.00. Chief Judge Wilson Cowen of the Court Of Claims was later to note:

> Wholly apart from their Tucker Act jurisdiction, the United States District Courts have for years exercised jurisdiction over suits brought by illegally discharged Government

employees for restoration to their former positions.

Until 1964, however, the District Courts did not have the authority to award the affected employee back pay for the period of his illegal discharge. On August 30, 1964, Congress enacted Public Law 88-519 which empowered the District Courts to render judgment on the claims of such employees for back pay.

The declared purpose of that act was to enable the employee to obtain all necessary relief in one action and to eliminate the necessity of filing another suit in the Court Of Claims for back pay.

Hearings before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, on H. R. 12392, March 1, 1972, pp. 12.

Although it expanded the arsenal of remedies available in the district courts, the 1964 Act in no way contracted the jurisdiction of the Court Of Claims. The Court retained, in toto, its powers to award money judgments. In a suit founded upon wrongful dismissal from government service, a claim that (as a result of the 1964 Act) the Court Of Claims could not render a money judgment for claims of less than $10,000.00 would have been rejected out of hand. As Chief Judge Cowen's statement clearly indicates, the purpose

of the 1964 Act was to facilitate actions in the district courts, but in no way to contract the jurisdiction of the Court Of Claims.

From 1964 through 1972 the relevant statutory provisions were the following:

28 U. S. C., Section 1491:

> The Court Of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department.

28 U. S. C., Section 1346 (a):

> The district courts shall have original jurisdiction, concurrent with the Court Of Claims, of: . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000.00 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department. . . .

As to claims in excess of $10,000.00, therefore, it was still necessary for any claimant to seek monetary relief in the Court Of Claims and to go to the district court for any non-monetary relief he might require. That the Court Of Claims lacked the competence to grant non-monetary relief as an incident to its moneary awards was confirmed by the 1969 Supreme Court opinion

in United States v. King, 395 U. S. 1, 89 S. Ct. 1501, 23 L. Ed. 2d. 52 reversing a Court Of Claims ruling that that Court was empowered to grant declarartory relief. King v. United States, 390 F. 2d. 894, 182 Ct. Cl. 613, (1968).

Congress responded in 1972 when Section 1491 of Title 28 was amended to extend the Court Of Claims jurisdiction so that in cases where monetary relief was properly requested the Court incident to its power to grant a money judgment, could also grant injunctive and declaratory relief. The amendment added the following language:

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such directsion as it may deem proper and just.

The amendment was "applicable to all judicial proceedings pending on or instituted after the date of its enactment," on August 29, 1972. P. L. 92-415, (1972). We put aside the issue of whether, even if it were intended to oust this court of jurisdiction in the future, the statute was designed to cancel jurisdiction in a case already commenced

in a district court--the situation before us.

The legislative history of the 1972 amendment makes manifest that the motivation for its enactment was a Congressional desire to respond to the need of the Court Of Claims to implement its monetary judgments with collateral equitable relief, so that litigants, if they so desired, would be able to obtain complete relief in the Court Of Claims. The legislative background, however, leaves little doubt that the added powers of the Court Of Claims to grant incidental relief were in no way intended to oust the jurisdiction of the district courts to act pursuant to its mandamus and declaratory judgment powers. See U. S. Code Congressional and Administrative News, 92 Congress, Second Session, 749, 3116, 5658 (1972); S. Rept. No. 92-1066, 92 Cong. 2d. Sess. 2 (1972); H. Rept. No. 92-1023, 92 Cong. 2d. Sess. 2 (1972); Hearings before Subcommittee on the judiciary, House of Representatives, on H. R. 12392, March 1, 1972; Congressional Record, May 1, 1972, H. 3769.

The bulk of the legislative history of H. R. 12392 is contained in the Hearings before the House Committee on the Judiciary, Subcommittee number 2, held on March 1, 1972. These hearings demonstrate the concern of Congress about the effect of the Supreme Court's decision in King upon the power of the Court Of Claims to issue orders directing restoration to office or position, placement in appropriate duty or retirement status and correction of applicable records.

The House Report on H. R. 12392 underlines this primary concern impelling passage

of the Amendment:

> One of the primary purposes of this legislation is to enable the Court Of Claims to provide for restoration to or placement in appropriate duty or retirement status as an "incident of and collateral to" the money judgments it now renders in civilian and military pay cases. As was observed by the witness appearing in behalf of the Department of Justice at a hearing on this bill on March 1, 1972, as a practical matter this type of cllateral relief generally follows the entry of a money judgment since the agency involved can provide such relief by administrative action. However, should such action be refused, the unsuccessful plaintiff in the Court Of Claims must institute a second proceeding in a United States District Court for restoration.
>
> House Report No. 92-1023, Pages 2-3.

The Senate Report is equally explicit in laying out the purpose of the enactment:

> The purpose of H. R. 12392 is to allow persons having monetary claims falling within the jurisdiction of the Court Of Claims to obtain all necessary relief in one action. The bill does not extend the class of cases over which the Court Of Claims has jurisdiction. The bill would provide an entire remedy which would complete the relief afforded by the judgment as an incident of and

> collateral to any judgment it may now render. . . .
>
> . . . . The power of the Court Of Claims hass been limited in the past to rendering money judgments. The interpretation of section 1491, title 28, United States Code, has excluded any collateral remedy even though a number of classes of cases, composing a substantial portion of the Court Of Claims docket, are subject to the need for collateral remedies in addition to a money judgment.
>
> Senate Report No. 92-1066, 2 U. S. Code Congressional and Administrative News 3116, 3117 (1972).

In suggesting that district court jurisdiction is ousted in these circumstances, defendants ignore the manifest legislative intent that H. R. 12392 not enlarge the jurisdiction of the Court Of Claims; the new equitable relief was meant to be collateral only. Our system of federal courts, fortunately, requires no such circuitous route to relief as suggested by defendants; a litigant is not required to resort to claiming monetary relief from the Court Of Claims solely for purposes of appending a non-monetary claim which constituted the relief the party was really seeking to begin with.

Claims of serious constitutional deprivations have been alleged in this cause. Only in the face of the clearest of Congressional intentions could the powers of this court to come to grips with claims of such dimension be ousted by the availability of monetary relief

from the Court Of Claims.

In only two of the many cases cited by defendants was district court jurisdiction declined on the ground that the Court Of Claims should determine the issue. Carter v. Seamans, 411 F. 2d. 767, (5th Cir. 1969), cert. denied, 397 U. S. 941, 90 S. Ct. 953, 25 L. Ed. 2d. 121, (1970); Parrish v. Seamans, 343 F. S. 1087, (D. S. C. 1972).

Carter v. Seamans was an action for a declaratory judgment that the plaintiff's discharge "under other than honorable conditions" was illegal and that he had continued to hold his commission and to be promoted at regular intervals, and for and injunction prohibiting the defendant from withholding all pay and allowances, estimated at $135,000.00. An action by the same plaintiff, based on the same allegations, was pending in the Court Of Claims, and had been stayed pending disposition of the case in the district court. Noting that the relief sought included a substantial claim for pay and allowances, the district court concluded that "the claim for back pay and allowances constitutes the keystone of this entire lawsuit", (emphasis added) and that the action "in substance . . . is [for] a money judgment against the United States for back pay in excess of $10,000.00." 411 F. 2d. at 771. Under 28 U. S. C., Section 1346 (a) (2), the court found that it did not have jurisdiction to make such a monetary award. It further held that, while it had mandamus jurisdiction under 28 U. S. C., Section 1361, it would decline to exercise that jurisdiction in view of its finding that the action was

essentially one for a money judgment that it could not grant. The Fifth Circuit affirmed in a short per curiam opinion, finding "no abuse of the district court's discretion" in deferring to the Court Of Claims. 411 F. 2d. at 769. (The district court opinion is unreported, but it is printed as an appendix to the Fifth Circuit opinion.)

Similarly, the plaintiff in Parrish v. Seamans, sought a judgment declaring his court-martial conviction void and restoring his rank, pay allowances and other benefits. The Board For Correction Of Military Records had already corrected his records to show that he had received an honorable discharge. The court found that, particularly in view of the fact that his records had already been corrected, "the crux of plaintiff's claim is monetary," and that the other relief requested was "only incidental to his monetary claim" 343 F. Supp. at 1093, 1094. Assuming it had jurisdiction the court declined to exercise it and followed Carter in deferring to the Court Of Claims, 343 F. Supp. 1094.

Thus, the Court Of Claims and the defendant United States in following its edict seek to void a complaint already rendered justiciable by the district court and formulted in the only manner in which relief thereunder could ever be secured. The Court Of Claims options to

supplant the unappealed District Court judgment with its own. This it cannot do, Carney v. U. S., 462 F. 2d. 1142, 199 Ct. Cl. 160, (1972).

This Court has recognized this problem in U. S. vv King, supra. The District Court recognized this problem and elucidated its solution, Melvin v. Laird, supra. Congress perceived, considered and ultimately, in its infinite wisdom, rectified the situation in P. L. 92-415, enacted August 29,, 1972. Following this line of authority, from its inception plaintiff's cause was relegated to a single course of relief through jurisdiction of the district court to entertain an action for a declaratory judgment and on to the Court Of Claims to secure monetary relief premised thereupon. Thus, simply put, the Court Of Claims has always been without jurisdiction. Accordingly, if anything, petitioner's suit in the Court Of Claims is premature.

There is not now nor has there ever

been any requirement that petitioner take the Government to court to prove his innocence of any crime or wrongdoing, Fifth Amendment, United States Constitution. A perfect defense was available to and duly and timely presented by petitioner at the very moment punitive action was contemplated.

Consequently, in essence, by his untoward action in May, 1965, Commander Jerry J. Holst was asking, in order for petitioner to obtain relief therefrom, that petitioner secure his own court-martial. But if petitioner had court-martial convening power, albiet by the ponderous circuitous route of compelling trial by mandamus in federal court, then the nedd for the "court-martial" usurping his Naval Reserve commission could never have occurred. For, in that event, petitioner would necessarily have had courts-martial convening authority over others as well and had the electronics technician instructor at NRSD 12-26 court-martialed and removed

from the service or, at least, from performance of training functions over a year previously, in December, 1963, thereby eclipsing the need for petitioner's single passive abstenance.

Now it is time for the Court Of Claims to become aware of the legal consequences of the thus promulgated jurisdictional policy.

Concurrent with perception of the only provisional route by which to purge petitioner's stigma of criminality and instability garnered only through the fortuitous mechanism of scruitinizing, Carter v. Seamans, infra, in researching the preparation of his appeal to the United States Court Of Appeals For the Ninth Circuit in the intimately collateral case against the Veterans Administration now appearing as Ross v. U. S., 462 F. 2d. 618, (1972), cert. denied 414 U. S. 821, (1973) on February 25, 1972, petitioner launched his attack against

the criminal negligence of his Navy Commander, at his intial contact with the concept, by the foreign to all laymen and exclusively within the provincial acumen and domain of the military law practicing legal community, device of seeking a declaratory judgment, pursuant to the jurisdiction conferred thereupon by U. S. C., Title 28, Section 2201, to effect a legal change of factual history already having transpired to reflect commissioning, three years of honorable service and promotion to lieutenant junior grade in the United States Naval Reserve and elimination of all other service or in the alternative breach of contract by the United States Navy in refusing to maintain training standards and allow petitioner to complete his R. O. C. training and extinguishment of petitioner's obligation thereupon in the United States District Court For the Central District Of California. Said District Court asserted jurisdiction

of said cause under said declaratory judgment act on May 25, 1972. On June 12, 1972 that Court, the Honorable Robert J. Kelleher presiding, entered a judgment, attached hereto as Appendix A, denying petitioner's motion for summary judgment and in favor of the defendant United States Navy and the United States Air Force solely on the grounds of petitioner's failure to exhaust his administrative remedies in the respective military departments' correction boards, but disavowing any statutory or limitations failure, in being invoked without prejudice to petitioner's refiling upon surmounting that obstacle and in view of petitioner's two alleged and readily proveable legal disabilities in excess of four months duration.

CONCLUSION

In view of all of the foregoing, it is respectfully submitted that a writ of certiorari should issue to review the discordant judgment of the Court Of Claims and remand the case thereto for further proceeding on the merits.

Respectfully submitted,

BY: _____
MICHAEL S. ROSS

5502 Pelham Road
Durham, North Carolina 27707

In Properia Persona

APPENDIX A

WILLIAM D. KELLER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief, Civil Division
CLAUDE A. PRICELY
Assistant U. S. Attorney
1100 U. S. Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: 688-2445

Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL S. ROSS,

Plaintiff,

v.

THE UNITED STATES OF AMERICA; JOHN [illegible], Secretary of the Navy; [illegible], JR., Secretary of the Air Force, and J. J. HOLST, CDR. USNR-R,

Defendants.

Civil No. 72-415-R.M

JUDGMENT IN FAVOR OF DEFENDANTS

The Court having filed its Findings of Fact and Conclusions of Law herein directing entry of judgment in favor of defendants and against plaintiff,

IT IS ADJUDGED that:

1. Plaintiff, Michael S. Ross, take nothing by virtue of his Complaint;

2. That the action be and the same is hereby dismissed without prejudice;

3. That the defendants have and recover their costs of action.

DATED: This _____ day of _____, 1972.

Presented by:

CLAUDE A. PRICELY
Assistant U. S. Attorney
Attorney for Defendants.

UNITED STATES DISTRICT JUDGE

WILLIAM D. KELLER
United States Attorney
PATRICK H. FROOD, JR.
Assistant U. S. Attorney
Chief, Civil Division
CLARK A. MICELY
Assistant U. S. Attorney
1100 U. S. Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: 688-2045
Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL S. ROSS,

Plaintiff,

v.

THE UNITED STATES OF AMERICA; etc., et al.,

Defendants.

Civil No. 72-415-RJK

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on regularly for hearing on defendants' Motion for Summary Judgment and the Court having considered the pleadings, affidavits and papers on file herein, argument of plaintiff and counsel for defendants, and being fully advised in the premises makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I

This is a civil action for correction of military records and damages in excess of $28,000.00 brought by plaintiff against defendants. The relief sought includes a claim for correction of plaintiff's Air Force records to eliminate all record of service in the Air Force, and for correction of his Navy records to reflect alleged entitlements to advancement in rate, commissioning as a Naval officer, active duty credit, an honorable discharge in 1968, damages including back Navy pay and allowances in excess of $28,000.00, and certain other relief.

APPENDIX A

II

Plaintiff has failed to file any application for relief with the Board for Correction of Naval Records pursuant to 10 U.S.C. §1552, et seq.

III

Plaintiff has previously filed application for certain relief from the Board for Correction of Air Force Records, but has never requested the relief he seeks in this action, namely to eliminate all record of his service in the Air Force.

IV

Plaintiff has failed to exhaust the administrative remedies provided under 10 U.S.C. § 1552, et seq.

CONCLUSIONS OF LAW

I

There is no genuine issue as to any of the foregoing findings of fact.

II

Plaintiff has failed to exhaust the administrative remedies provided under 10 U.S.C. § 1552, et seq., with reference to the relief sought in this action.

III

Plaintiff's complaint fails to state a claim upon which relief can be granted.

IV

Defendants are entitled to judgment as a matter of law dismissing plaintiff's Complaint without prejudice and to their costs of action incurred herein.

DATED: This ___ day of _____, 1972.

Presented by:

[illegible]
Assistant U. S. Attorney

Attorneys for Defendants.

_____
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 352-73

MICHAEL S. ROSS

v.

THE UNITED STATES

Before SKELTON, Judge, Presiding, KASHIWA and KUNZIG, Judges.

ORDER

This case comes before the court on defendant's motion, filed December 17, 1973, to dismiss plaintiff's petition. Upon consideration thereof, together with the opposition filed thereto, without oral argument, it is concluded that plaintiff's alleged claim is barred by the statue of limitations, 28 U.S.C. § 2501. [See Friedman v. United States, 159 Ct. Cl. 3 310 F.2d 381 (1962), cert. denied, 373 U.S. 932 (1963) and Kirby v. United States, 201 Ct. Cl. 527 (1973)].

IT IS THEREFORE ORDERED that defendant's said motion to dismiss the petition be and the same is granted and plaintiff's petition is dismissed.

BY THE COURT

Dated: March 7, 1974

Byron Skelton
Judge, Presiding

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

170-73	RICHARD EARL CHAPMAN	)	
		)	
352-73	MICHAEL S. ROSS	)	v. THE UNITED STATES
		)	
466-73	LUIS E. COLIGADO	)	

Before SKELTON, Judge, Presiding, KASHIWA and KUNZIG, Judges.

ORDER

These cases come before the court on plaintiffs' motions for amendment of dismissal order, for rehearing, reconsideration and further relief filed pursuant to Rule 151. Upon consideration thereof, without oral argument,

IT IS ORDERED that said motions be and the same are denied as follows:

170-73 Richard Earl Chapman. Plaintiff's motion, filed April 15, 1974, for amendment of dismissal order.

352-73 Michael S. Ross. Plaintiff's motion, filed April 15, 1974, for rehearing.

466-73 Luis E. Coligado. Plaintiff's motion, filed April 23, 1974, for reconsideration.

BY THE COURT

MAY 31 1974

Byron Skelton
Judge, Presiding

APPENDIX D

APPENDIX D

MICHAEL S. ROSS
[illegible]
Apartment 42
Durham, North Carolina 27705

IN THE UNITED STATES COURT OF CLAIMS

MICHAEL S. ROSS,	)	
	)	
Plaintiff,	)	CIVIL NO. [illegible]
	)	
vs.	)	
	)	
THE UNITED STATES,	)	NOTICE OF APPEAL
	)	
Defendant.	)	

Notice is hereby given that Michael S. Ross, Plaintiff above-named, hereby appeals to the United States Supreme Court via Writ of Certiorari pursuant to Title 28, U. S. C., §1251 from the Order of Dismissal of Petitioner's Petition on May 15, 1974 and Denial of Rehearing, entered in this Court on June 5, 1974.

Requested this 11th day of June, 1974 at Durham, North Carolina.

SIGNED: _____
MICHAEL S. ROSS

[illegible] Avenue
Apartment 42
Durham, North Carolina 27705

U. S. C., Title 28, Section 1346.

United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court Of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or cllected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000.00 in amount, founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated of unliquidated damages in cases not sounding in tort.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after Januaryl, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act of omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private citizen, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

STATE OF NORTH CAROLINA)
)
CITY OF DURHAM, COUNTY OF DURHAM)

_____,

being first duly sworn on oath, says:

I am a citizen of the United States and a resident of the City of Durham and County of Durham, State of North Carolina. I am over the age of eighteen years and not a party to the within action. My business address is _____.

On August 17, 1974, I served the within "PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS," on the defendant United States in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States post office mail box at Durham, North Carolina, addressed as follows:

PETER A. T. SARTIN
Trial Attorney, Civil Division
Department of Justice
717 Madison Place
Washington, D. C. 20005

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-184

MICHAEL S. ROSS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner brought this suit in the Court of Claims, seeking correction of his military records as well as damages. The court held that petitioner's claim was barred by the court's six-year statute of limitations, 28 U.S.C. 2501. Petitioner now contends that a prior district court action, which he instituted on February 25, 1972, tolled the running of the statute of limitations.

On February 20, 1966, petitioner was discharged from the Navy Reserve because of his enlistment in the Air Force. On June 17, 1966, he was admitted to the Air Force Hospital at March Air Force Base, California, for treatment of chronic schizophrenia. He was thereafter found unfit for service and discharged on August 24, 1966.

1. Petitioner brought suit in the United States District Court for the Central District of California on February 25, 1972. He alleged that the Navy had unjustly harassed him and excluded him from desirable training, thus defaming him and "effectively * * * convict[ing him] of criminal

conduct" (Pet. 22). His suit sought $28,000 in damages and expungement from his military records of all references to his service in the United States Air Force. On June 12, 1972, petitioner's suit was dismissed without prejudice by the district court for failure to exhaust administrative remedies and failure to state a claim upon which relief could be granted.

Petitioner then applied to both the Air Force and Navy Correction Boards for relief. The Air Force Correction Board denied his application on September 9, 1973,[1] and he brought this suit in the Court of Claims on September 25, 1973.

2. The Court of Claims exercises jurisdiction over suits filed within six years after the claim first accrues. 28 U.S.C. 2501. A claim for illegal discharge accrues immediately upon removal from military service. *Mathis v. United States*, 391 F. 2d 938 (Ct. Cl.), affirmed after remand, 421 F. 2d 703. We submit that the tolling question presented by petitioner does not control this case. Petitioner was discharged from the Navy on February 20, 1966, and filed his district court suit six years and five days later on February 25, 1972. Thus even if the filing in the district court is treated as a filing in the Court of Claims, it is out of time.

---

[1]The Air Force Correction Board indicated that it could not act favorably on petitioner's request. Petitioner's theory was that his 1966 discharge from the Navy was void, and therefore his enlistment in the Air Force was invalid. But 10 U.S.C. 1552(a) permits the Secretary of a military department to correct only the military records of his own department, and the Air Force Correction Board therefore had no jurisdiction; it recommended that petitioner bring his claim before the Navy Correction Board.

In any event, the Court of Claims' statute of limitations is not tolled by petitioner's unsuccessful attempts to secure alternative remedies, such as suit in a federal district court. *Ylagan* v. *United States*, 101 Ct. Cl. 294, certiorari denied, 322 U.S. 763. Nor does recourse to the administrative process toll the statute. *Vincin* v. *United States*, 468 F. 2d 930 (Ct. Cl.).

The Court of Claims remedy is independent of these alternatives, and its statute of limitations unaffected by them. *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 517, is not to the contrary. *Crown* held that because the disputes clause of a government contract required the contractor to undertake administrative adjudication of his claims before judicial review was available, the statute was tolled by resort to the administrative proceedings. However, *Crown* distinguished those cases in which suit could have been brought without first resorting to administrative remedies. 386 U.S. at 519. The distinction controls the instant case; suits for correction of records and money damages because of illegal discharge can be brought in the Court of Claims without exhausting administrative remedies. See *Lipp* v. *United States*, 301 F. 2d 674 (Ct. Cl.), certiorari denied, 373 U.S. 932; *Friedman* v. *United States*, 310 F. 2d 381 (Ct. Cl.), certiorari denied *sub nom. Lipp* v. *United States*, 373 U.S. 932.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.